

1. What Is a Constitution?

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ABSTRACT – This chapter asks what we mean by constitution in the modern world, what was meant by constitution in the Greek world, and what was meant by *Constitution* when the Greeks wrote about a particular constitution. In the modern world a Constitution is a single document containing the fundamental rules governing the working of a state, such as the Constitution of the U.S.A. In the Greek world a constitution focused on who were the citizens of a state and what were their rights and duties in deliberation, administration and justice. However, writings on a *Constitution*, including the *Athenian Constitution* preserved with the works of Xenophon, dealt not only with matters of that kind but also with a state's way of life in a broader sense; and, although that is not true of the *Athenian Constitution* written in Aristotle's school, the fragments suggest that that was true of the school's other Constitutions.

KEYWORDS – Athens; citizenship; constitution; government; *polis*; Sparta; way of life – Atene; cittadinanza; costituzione; governo; *polis*; Sparta; stile di vita.

1. – Because I have commented both on the Aristotelian *Athenian Constitution*, in a monstrous book published in 1981, and more recently and briefly in the edition issued in 2016 by the Fondazione Lorenzo Valla ¹, and on the Old Oligarch's *Athenian Constitution*, in the edition of 2008 in which I collaborated with J.L. Marr ², it was difficult for me to find a topic on which to speak at the conference on those two works. Hearers then and readers now would rightly feel let down if I provided simply a selection of points which I have already made elsewhere. In asking, «what is a constitution?» I have tried to fit into this conference/volume by adding something new to a little, but I hope not too much, of what I have said before.

¹ I thank the organisers/editors for holding a stimulating conference and inviting me to participate in it; and particularly Prof. Gargiulo, for translating my English into Italian, and prompting me to improve at various points what I had written, in Rhodes 2016. On the Aristotelian *Atb. Pol.* see Rhodes 1981, 2016 (English version 2017); cf. 1984, and various discussions of individual points.

² Marr - Rhodes 2008.

To expand the question: what is a constitution, when we in our world talk of one; what was a constitution, when ancient Greeks talked of one; and what was a *Constitution*, when ancient Greeks wrote books on *The Athenian Constitution*, or *The Spartan*, or whatever?

2. – In the modern world, I think we should say that a Constitution is a text which collects in a single document the fundamental rules governing the functioning of a state. The Constitution of the U.S.A.³ was signed by members of the Constitutional Convention on 17 September 1787; it was augmented in 1791 by the ten amendments which constituted the Bill of Rights; and there have been 17 further amendments. The original document began with a preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

What followed comprised seven articles, three on the separate legislative, executive and judicial powers, three on the relations of the state governments and the federal government, and one on the procedure for ratification. The ten rights specified in the Bill of Rights concern individual freedoms (e.g. freedom of religion, freedom of speech), the right to bear arms, the right not to have soldiers billeted in one's house in peacetime, five matters concerned with fair judicial procedures, provision for further «unenumerated» rights of individuals, and provision that the federal government has only such powers as have been explicitly granted to it. So this is not a complete instrument of government; but the original document sets out the basic principles of separation of powers and relations between state governments and the federal government, while the Bill of Rights combines basic citizen freedoms and rights in one's dealings with the judicial authorities with the highly particular protection against the billeting of soldiers and the clause on the right to bear arms which has become contentious in our own time. The U.S.A. has in addition many constitutional laws and rules which are not part of this Constitution, but this Constitution is primary, and all other laws and rules must be in accordance with it: article VI.2 reads,

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

³ Accessible online at (for instance) <http://www.constitutionus.com>.

The United Kingdom, by contrast, has a multiplicity of constitutional laws and rules, but as is often said it has no underlying constitutional document. There have, however, been approaches to such a document, particularly in Magna Carta (more fully, *Magna Carta Libertatum*), first issued in 1215 and regulating the powers of the king and the barons⁴, and in the Bill of Rights of 1689, which recorded the basis on which William III and Mary became king and queen after the ousting of James II, and dealt particularly with the powers of the king and parliament⁵.

3. – If we turn to the Greek world, what is most clearly a constitution is the document produced for Cyrene by Ptolemy, probably in 322/1⁶. But there are in fact several others, beginning with the Great Rhetra in Sparta, probably of the early seventh century⁷; and including the two drafts, one «for the future» and the other «for the immediate crisis», produced under the Athenian oligarchy in 411 (while one of the unfortunate additions made to the Aristotelian *Athenaion Politeia* when it was revised was the so-called constitution of Draco, certainly a later concoction)⁸. Plato's *Laws* expounds a constitution on a very large scale. The earliest surviving Greek inscribed law is a constitutional law, from Drerus in Crete, of the later seventh century, forbidding anybody to hold the office of *kosmos* more than once in ten years⁹. In Athens Solon must have enacted constitutional laws, at any rate on matters where he introduced a change in practice, and so Leão and I included some constitutional laws in our collection of the fragments whereas Ruschenbusch did not¹⁰. Athens laid down some constitutional rules for Erythrae, including a council of 120 on which a man could not serve more than one year in four, and an oath to be sworn by the council, probably

⁴ For a complete Latin text and English translation see (for instance) http://www.orbilat.com/Languages/Latin/Texts/06_Medieval_period/Legal_Documents/Magna_Carta.html.

⁵ Accessible online at (for instance) <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction> (for the dating there to 1688 see note X1).

⁶ *SEG IX* 1.

⁷ Plut. *Lyc.* 6.

⁸ 411, [Arist.] *Ath. Pol.* 30, 1 (εις τὸν μέλλοντα χρόνον and ἐν ... τῷ παρόντι καιρῷ, 31, 1). On the date and status of these see Rhodes 1981, 386-389; 2016, 266-267; 2017, 290-291, and works cited there. Draco, [Arist.] *Ath. Pol.* 4.

⁹ Meiggs - Lewis 1969, nr. 2.

¹⁰ Leão - Rhodes 2015, fr. 74/1-5, 80/1: contrast Ruschenbusch 1966 – but he did grant that «die Axones wohl vereinzelt verfassungsrechtliche Bestimmungen, aber kein Verfassungsgrundgesetz im modernen Sinne enthielten» (p. 26).

in the late 450's¹¹; Alexander the Great, probably in 334, stipulated that Chios was to have a democracy and that *nomographoi* should be elected to draft appropriate laws, which were to be referred to him¹². Whatever may be the immediate source of the account given in the *Hellenica Oxyrhynchia* of the working of the Boeotian federation in the late fifth and early fourth centuries, those details must have been laid down in one or more laws¹³.

Such provisions came to be labelled *πολιτεία* or *πολίτευμα*, or with the verb *πολιτεύειν* or *πολιτεύεσθαι*. Herodotus does not use these terms, either in connection with the constitutional debate which he attributes to the Persians or elsewhere¹⁴, but Thucydides does¹⁵, and the Old Oligarch uses *politeia* twice in his first sentence and many times subsequently¹⁶. Aristotle, using the comparison of state and individual familiar from Plato's *Republic* (*Politeia*), says that we need to consider what is the best *politeia* for most cities and the best *βίος* (form of life) for most individuals, «for the *politeia* is as it were the form of life of the *polis*»¹⁷.

An important question with regard to Greek constitutions was which of the inhabitants were to count as citizens with political rights, since there would be free-born natives who would have rights under a more democratic régime but who would not under a more oligarchic régime. Aristotle begins book III of his *Politics* by saying that to investigate the *politeia* one must first ask what the *polis* is, adding that the *politeia* is a disposition of those who inhabit the *polis*, and that the citizens (*politai*) are those who hold offices including the «indefinite offices» of serving in juries and the assembly¹⁸. Ptolemy's constitution for Cyrene begins by defining who are to be *politai*, citizens in the broadest sense, and it then distinguishes from these the *politeuma*, here used to denote the Ten Thousand enfranchised citizens¹⁹.

Elsewhere in the *Politics* Aristotle says:

The *politeia* of a *polis* is the disposition of the various offices and particularly that which has control over everything: for everywhere the *politeuma* has

¹¹ IG P 14 = Osborne - Rhodes 2017, nr. 121.

¹² Rhodes - Osborne 2003, nr. 84. A. 3-7, using the word *πολίτευμα*.

¹³ *Hell. Oxy.* 19, 2-4 Chambers 1993, in the summing-up at the end of § 4 using *ἐπολιτεύετο*.

¹⁴ He uses *πολιτήν* and *πολιτικόν* of citizenship and the citizen body: Her. IX 34, 1; VII 103, 1.

¹⁵ E.g. *πολιτεία*, Thuc. I 18, 1; *πολιτεύειν*, I 19.

¹⁶ [Xen.] *Ath. Pol.* I 1.

¹⁷ Arist. *Pol.* IV 1295a 25 - b 1; cf. e.g. Plat. *Resp.* II 368e 2 - 369a 4.

¹⁸ Arist. *Pol.* III 1274b 32 - 1275a 33.

¹⁹ *Politai*, SEG IX 1, ll. 1-5 (preamble); *politeuma*, l. 5 (preamble), ll. 6-15 (§ 1). This does not use *politeia*, but after *ἀ[γαθὰ τύχ]α* plunges *in medias res* with *[πολ]ίται ἔσσονται ...*

control over the *polis*, and the *politeuma* is the *politeia*. I mean, for instance, that in democracies it is the *demos* which has control.²⁰

Ptolemy's constitution for Cyrene proceeds to deal with the council, the *gerontes*, the *strategoï* and the *nomophylakes*; after which it addresses the powers of those bodies, judicial procedures and the exclusion from office of men holding a variety of public appointments²¹. So in a formal sense the *politeia* specifies who are full citizens with political rights and what are the powers and duties of various entities within that body of full citizens. Aristotle adds that there is more to be taken into account than the formal structure: a constitution which is technically democratic may be run in an oligarchic way, and one which is technically oligarchic may be run in a democratic way²².

When discussing the best form of *politeia*, at the end of *Politics* IV, Aristotle again begins with the body of citizens with rights²³, and then moves on to the τρία μόρια τῶν πολιτειῶν πασῶν (the three elements of all *politeiai*): τὸ βουλευόμενον περὶ τῶν κοινῶν (deliberation about public affairs), τὸ περὶ τὰς ἀρχάς (the officials) and τὸ δικάζον (the administration of justice)²⁴. This appears close to the separation of legislative, executive and judicial powers recommended by Montesquieu and embodied in the Constitution of the U.S.A.²⁵; but the basis for it is an identification of different functions rather than a belief that the different functions need to be exercised by distinct bodies. A Demosthenic speech mentions as the four main manifestations of the proper functioning of the *polis* the meeting of the council (which in Athens had powers of all three kinds, a point to which I shall return), the people's going to the assembly, the courts' being manned and the succession of each year's officials by those of the next year²⁶.

In the analytic part of the Aristotelian *Ath. Pol.* we find a variation on this theme. Chapter 42 defines the entitlement to citizenship and then deals with the registration and training of citizens. A long section, chapters 43-62, is concerned with officials; but it starts with the council, which

²⁰ Arist. *Pol.* III 1278b 8-12; cf. IV 1289a 15-18, 1290a 7-10.

²¹ *SEG* IX 1, ll. 16-33 (§§ 2-5); ll. 34-45 (§§ 6-7).

²² Arist. *Pol.* IV 1292b 11-17.

²³ Arist. *Pol.* IV 1296b 13 - 1297b 34.

²⁴ Arist. *Pol.* IV 1297b 35 - 1301a 15; cf. the more complex analysis, of deliberative, judicial and various kinds of executive offices, in VI 1321b 4 - 1323a 10.

²⁵ Montesquieu 1748, book XI, chapter 6; in the U.S.A., Congress (legislature), the President (executive) and the judicial power.

²⁶ Dem. XXV *Aristogaiton* i, 20 (whether that speech is by Demosthenes does not matter here).

was involved in decision-making and administration and justice, and the assembly's role in decision-making is treated not separately but in connection with the council's role²⁷. Finally chapters 63-69 deal not with the whole subject of justice (many judicial matters have been dealt with in connection with the relevant officials) but with the organisation of the *dikasteria*.

Athens did not adhere to the separation of powers, either on the Aristotelian or on any other model. In modern states the authorities are powerful, so it is considered important that the judiciary should be independent and able to require even the authorities to comply with the law; but in Athens and other Greek states the authorities were weak, and it was considered natural that they should be given judicial power to reinforce their administrative power. Beyond that, in Athens the council was involved both in decision-making, by preparing business for the assembly and making some lower-level decisions itself, and in administration, by supervising the various officials and by having many of them appointed from its own members. And both the council and the assembly had some involvement in judicial matters.

4. – In the last part of my investigation I want to examine what Greek writers actually did when they wrote about a *Constitution* or commented on a constitution in works of other kinds. We have seen that the analytic part of the Aristotelian *Ath. Pol.* gives an account of the mechanisms of the *politeia* organised in a pattern similar to that of Aristotle's *Politics*. Before that the historical part gives an account of the development of the *politeia* to the end of the fifth century, seen, according to the summary of that part in chapter 41, as a series of *metabolai* (changes), of which some moved Athens towards and others moved it away from the democracy which Aristotle would have regarded as its *telos* (goal). Classicists are sometimes asked what, if just one of the many lost works that we know of could be recovered, they would like that work to be; and one of the two answers between which I waver would be one other of the *Politeiai* written in Aristotle's school, so that we could see how far that did or did not follow the same pattern as the *Ath. Pol.* (My other answer would be one of the *Atthides*, preferably that of Androtion or that of Philochorus.) There is in fact a Belgian scholar, Dr. Gertjan Verhasselt, who is planning to study the fragments of the other *Politeiai* and to see what can be learned about those works²⁸.

From outside Aristotle's school there are two other *Politeiai* which survive, both of them preserved with the works of Xenophon: the *Ath. Pol.*

²⁷ Council, [Arist.] *Ath. Pol.* 43, 2 - 49; council and assembly in decision-making, 43, 2 - 44. The separate fourth-century procedure for enacting *nomoi* is not mentioned at all.

²⁸ Private communication.

which was written most probably in the 420's by an unknown author who was called by Gilbert Murray the «Old Oligarch»²⁹, and the *Lakedaimonion Politeia* which is generally accepted as being Xenophon's own work.

The Old Oligarch's pamphlet is neither a history nor a factual analysis but a piece of polemic, arguing strangely that democracy is bad in principle, because it promotes the interests of bad men rather than good men, but in Athens because of the part played in the community by the poorest citizens it is appropriate, successful and stable.

Chapter 1 mentions the *politeia* at the outset³⁰, and starts by substantiating the basic point, that the poorest citizens deserve to rule because it is they who row the ships on which Athens' power depends, and that they naturally seek their own interests rather than the best interests of Athens³¹. This accords with the relativist view promoted by some of the sophists, that there is no absolutely best form of government but everybody will favour the form conducive to his own interests³². After other points about the lower-class citizens, chapter 1 ends with the interests of the Athenian *demos* in the empire³³.

The main theme of chapter 2 is not the democracy or the *demos* as such, but the advantages which Athens derives from the naval power for which the *demos* is important³⁴. In the middle of that is a passage perhaps displaced from chapter 1 on the *demos*' enjoyment of publicly-funded festivals, gymnasia and the like³⁵; and the chapter ends with further points about the *demos*, that individuals can deny responsibility for the assembly's decisions and their consequences, that comedians are allowed to attack prominent individuals but not the *demos*, and that the *demos* favours not good men but men who support it (and upper-class men who do support it have chosen to be wicked)³⁶.

Chapter 3 begins by reiterating the author's main point³⁷, and then uses a discussion of the amount of public business transacted at Athens³⁸ to argue that, apart from minor tinkering, it would not be possible to improve

²⁹ The 420's is the date which I consider most likely, from suggestions which have ranged from the 440's to the fourth century: see Marr - Rhodes 2008, 3-6, 31-32. «Old Oligarch», Murray 1897, 167-169.

³⁰ [Xen.] *Ath. Pol.* I 1 (περὶ δὲ τῆς Ἀθηναίων πολιτείας); cf. 3, 1.

³¹ [Xen.] *Ath. Pol.* I 1-9.

³² Cf. Lys. XXV (*Overthrowing Democracy*) 8.

³³ [Xen.] *Ath. Pol.* I 10-13, 14-19.

³⁴ [Xen.] *Ath. Pol.* II 1-8, 11-16.

³⁵ [Xen.] *Ath. Pol.* II 9-10.

³⁶ [Xen.] *Ath. Pol.* II 17, 18, 19-20.

³⁷ [Xen.] *Ath. Pol.* III 1.

³⁸ [Xen.] *Ath. Pol.* III 1-8.

the Athenian constitution without destroying the democracy³⁹. The work ends with two additional points: that democratic Athens naturally supports the *demos* in disputes in other states, and that there are not many Athenians who have been unjustly disfranchised and who might form the core of a movement against the democracy⁴⁰.

Only two passages are concerned with the *politeia* as Aristotle would have understood it: the early part of chapter 1, on a régime which gives power within the *polis* to the *demos* because of the importance of the *demos* to the power of the *polis* in the Greek world, and the early part of chapter 3, on the amount of public business which the large and complex *polis* of Athens deals with. The rest is concerned with what we might call the Athenians' way of life, much of it the distinctively demotic nature of that way of life, but the section on sea power in chapter 2 relevant only in that Athens' sea power is bound up with the importance of the *demos*.

How does that compare with the treatment of Sparta in Xenophon's *Lakedaimonion Politeia*? Although the work has been given by somebody the title *Lakedaimonion Politeia*, the text does not use the word *politeia* at all, except once to contrast the Spartan régime with «other *politeiai*»⁴¹, but in the opening paragraph and at later points it refers to the Spartans' *epitedeumata* (practices)⁴².

Chapter 1 deals with the begetting of children, chapter 2 with the education of boys, chapter 3 with the work and modesty imposed on young men, chapter 4 with the good competitiveness encouraged among mature men and the hunting prescribed for older men. Chapter 5 is devoted to the messes, chapter 6 to common responsibility for children, and common access to slaves, animals and food, chapter 7 to the ban on citizens' engaging in money-making, chapter 8 to obedience to the laws and the officials, chapter 9 to the preference for an honourable death over a shameful life, chapter 10 to the importance of old men in the *gerousia* and to the compulsion to live a life of virtue. Chapter 11 is concerned with the organisation of the army, chapter 12 with military camps and with exercises to be taken by soldiers on campaign, chapter 13 with the status of the kings in the army, with a paragraph on other military practices inserted⁴³. Chapter 14, remarking that Lycurgus' laws are no longer observed, has often been seen as prob-

³⁹ [Xen.] *Ath. Pol.* III 8-9.

⁴⁰ [Xen.] *Ath. Pol.* III 10-11, 12-13.

⁴¹ Xen. *Lac. Pol.* 15, 1. Gray 2007, 146 notes that *Cyr.* I 2, 15 refers to the totality of the Persians' institutions as their *politeia*.

⁴² Xen. *Lac. Pol.* 1, 1; cf. 5, 1 and also 6, 4 (*epitedeuesthai*). Xenophon also uses *nomoi* (laws) and *nomima* (institutions).

⁴³ Xen. *Lac. Pol.* 13, 8-9.

lematic, though it and its position in the work have had their defenders⁴⁴: it seems to interrupt the exposition by remarking that in Xenophon's own time the Spartans do not keep to the laws of Lycurgus as they did in the past. The last chapter, 15, returns to the kings, with the position of the kings in the *polis* during their lives and the honours shown to them when they die.

This is concerned overwhelmingly with the Spartans' way of life, and the *politeia* in Aristotle's sense is scarcely mentioned. The kings are mentioned for their role in the army and for their status in the city⁴⁵, but not for their membership of the *gerousia*; all we are told of the *gerousia* is that the members are elected and that they judge capital trials⁴⁶. Of the ephors, Xenophon reports that they appoint the *hippagretai* who form the core of the Spartan army's *élite* force, that they have extensive judicial powers, that they call up the army and two of them accompany a king on campaign, and that they do not stand before the kings but represent the *polis* in the monthly oath between kings and *polis*⁴⁷. He says nothing about the assembly or the *perioikoi*, and nothing explicitly about the helots (but citizens' clothing is to be made by slave women, *doulai*, rather than citizen wives, and citizens are allowed if necessary to use other men's *oiketai*)⁴⁸.

The Athenian Critias wrote *Politeiai* both in verse and in prose: a few fragments are quoted from the *Spartan Politeia* in verse and from the *Spartan* and others in prose⁴⁹. Many of these fragments, like Xenophon's work, are concerned with the way of life rather than with the *politeia* in a narrow sense, for instance passages on Spartan habits in drinking (a subject on which Xenophon commented too)⁵⁰.

One other text which we should consider is the funeral oration which Thucydides attributed to Pericles⁵¹. When he mentions the *politeia* he does at first understand that in the narrow sense: Athens does not copy others but is an example to them; it has a democracy, based not on a few but on a larger number; in private matters all Athenians are equal before the laws, and in public life men gain preferment not by rotation but by merit⁵² (except for military offices, that was not in fact true of democratic

⁴⁴ Chapters 14 and 15 both postscripts: MacDowell 1986, 8-14. Chapter 14 in its position defended, Humble 2004; Gray 2007, 217-221.

⁴⁵ Xen. *Lac. Pol.* 13, 15.

⁴⁶ Xen. *Lac. Pol.* 10, 1-3.

⁴⁷ Xen. *Lac. Pol.* 4, 3-4; 8, 3-4; 11, 2; 13, 5; 15, 6-7.

⁴⁸ Xen. *Lac. Pol.* 1, 4; 6, 1, 3.

⁴⁹ Verse, Critias, *Vorsokr.*⁶ 88 A 22; B 6-7, perhaps 8-9. Prose, B 30-8: *Athenian*, 30, perhaps 53-73; *Thessalian*, 31; *Spartan*, 32-37.

⁵⁰ Critias, *Vorsokr.*⁶ 88B 6, 33-34: cf. Xen. *Lac. Pol.* 5, 4-7.

⁵¹ Thuc. II 35-46.

⁵² Thuc. II 37, 1.

Athens). But he then proceeds to other aspects of the Athenians' way of life: they live as free men, but obey the laws and the officials; they have an abundance of festivals and imported goods, they live a relaxed life but can fight when necessary, they love beauty without extravagance and wisdom without softness, they believe in discussion before action, they take the initiative in doing good to others to earn their gratitude⁵³.

Plato's *Laws* is indeed concerned with the formal constitution of the ideal city – it recommends a blend of autocracy and freedom, and obedience to law; and it catalogues the officials and lawcourts that will be needed⁵⁴ – but beyond that it seeks to regulate the whole life of the community.

5. – In a formal sense, then, the *politeia* was as Aristotle defined it, and as we in our world should define a constitution; the Aristotelian *Ath. Pol.* was concerned with the history and the working of the *politeia* in that formal sense. But *politeia* could also be used more broadly, of a particular community's way of life, and when Greeks wrote about the *politeia* of a *polis* they often understood it in that broader sense. I look forward to what Dr. Verhasselt will tell us about the Aristotelian school's other *Politeiai*, but we have only to look at the *Epitome* of Heraclides to see that many of them included material of that kind, which is not present in the *Ath. Pol.*⁵⁵. The *Ath. Pol.* does not exemplify a model followed in all the others.

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⁵³ Thuc. II 37, 2 - 41.

⁵⁴ Plat. *Leg.* III 693d-701e; IV 709c-715d; VI 751a-768e.

⁵⁵ Arist. fr. 611 Rose 1886 = Dilts 1971: §§ 12-13 (Sparta), 15 (Crete), 27-29 (Ceos), 44 (Tyrrenians), 46 (Phasis), etc.

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